

Internal Revenue Service  
**memorandum**

CC:TL-N-8178-86

Brl:MLTorri

date: SEP 24 1986

to: District Counsel, Manhattan NA:MAN

from: Director, Tax Litigation Division CC:TL

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subject: Partnership Starting Date -  
[REDACTED]

This is in response to your request for technical advice dated July 30, 1986, concerning the above-referenced limited partnership.

ISSUE

Whether a real estate limited partnership which filed a Certificate of Limited Partnership on [REDACTED], and which stated a business commencement date of [REDACTED], on the partnership return, should be treated as a TEFRA partnership. RIRA Nos. 6221.00-00; 6225.00-00; 6229.00-00.

FACTS

[REDACTED] (hereinafter sometimes referred to as the Partnership) is a Pennsylvania limited partnership. The partnership is a real estate tax shelter. The initial Certificate of Limited Partnership was filed on [REDACTED]. The certificate listed three general partners and one limited partner. An Amended and Restated Certificate of Limited Partnership listing newly-admitted limited partners was filed on [REDACTED].

The partnership tax return declares that the Partnership's major asset, a building, was acquired on [REDACTED]. However, the contracts relating to the purchase of the building state that the property was acquired as of [REDACTED]. The return also states that the Partnership commenced business on [REDACTED].

The title insurance policy on the building was dated [REDACTED]. In addition, the settlement agreement between the Partnership and the seller of the building, dated [REDACTED], provided that interest in the amount of \$ [REDACTED] for the period [REDACTED] through [REDACTED], had been paid by the Partnership.

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The Partnership opened a bank account on [REDACTED] with an initial \$ [REDACTED] deposit. A subsequent deposit of \$ [REDACTED] was made on [REDACTED] (presumably with subscription monies received from the limited partners), and a check in that amount was issued on the same date to the seller of the building.

The general partners of the Partnership were also the shareholders of a corporation named [REDACTED]. [REDACTED] incurred the start-up costs for the Partnership. On [REDACTED], the Partnership issued three checks to [REDACTED] totalling \$ [REDACTED] as reimbursement for syndication costs and for the Partnership's Blue Sky filing fees. Most of the expenditures for which [REDACTED] was reimbursed were probably incurred by the corporation prior to September 3, 1982.

The Pittsburgh District Director's Office, which has jurisdiction over the Partnership return and audit, determined that [REDACTED] was a TEFRA partnership, and it commenced partnership-level administrative proceedings in accordance with the provisions of I.R.C. §§ 6221 through 6233. As a result, no extensions of the statute of limitations on assessment with regard to the individual partners' returns were obtained and, with one exception, no statutory notices of deficiency were issued to partners disallowing partnership items.

Due to a clerical error, the partnership was not classified as a TEFRA partnership with respect to a [REDACTED] partnership interest held by [REDACTED] (hereinafter "taxpayers"). On [REDACTED], prior to completion of the partnership audit and prior to the issuance of a final partnership administrative adjustment (FPAA), the taxpayers were sent a statutory notice of deficiency. The deficiency was based solely upon the disallowance of partnership items attributable to the taxpayers' interest in [REDACTED].

Taxpayers' counsel subsequently contacted the Brookhaven Service Center inquiring about the reason for issuing the statutory notice. He was informed that the notice had been improperly issued and that the taxpayers' sole recourse was to file a petition with the Tax Court. Taxpayers' counsel later informed District Counsel, Manhattan, that he would not file a

petition in Tax Court on behalf of the taxpayers. Instead, if necessary, he would seek an injunction barring the Service from assessing a deficiency before the close of the 150th day after the day on which an FPAA is mailed to the tax matters partner of [REDACTED].

#### DISCUSSION

As part of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Congress enacted I.R.C. §§ 6221 through 6231, which provide for unified administrative and judicial proceedings at the partnership level. These partnership audit provisions are generally applicable to partnership taxable years beginning after September 3, 1982. The critical question in determining whether a particular partnership is a TEFRA or non-TEFRA partnership for 1982 is whether the partnership's taxable year commenced after September 3, 1982.

It is our understanding that some examiners have made the TEFRA/non-TEFRA determination solely by relying upon the information contained on the partnership return, namely, Item E, date business started, and Item N, the number of months in 1982 that the partnership was actively operated. Apparently this has been done based upon a misplaced reliance on an estoppel theory, i.e., since the partnership supplied the information on the return it should be precluded from contending that it is a non-TEFRA partnership. It appears that the determination in the present case was based on Item E and Item N as well as other factors.

We agree with you that the formation date, rather than the date business started, should be controlling with respect to determining when a partnership's taxable year began, and that it is not sufficient to simply rely upon Item E and Item N.

The primary criterion for determining the formation date is either the date of filing of the Certificate of Limited Partnership with the designated state authority in accordance with state law, or the date that the partnership agreement was entered into. Thus, if the certificate was filed or the partnership agreement was made after September 3, 1982, the inquiry ends there. If, however, the filing date or agreement date was prior to September 3, 1982, this is merely a threshold factor in determining formation date. Further factors must be considered because tax shelter promoters often form a "shell" or "dummy" limited partnership and file the certificate (naming a nominal limited partner) in advance of actually selling partnership interests. If additional facts suggest that a partnership was actually formed after September 3, 1982, and it did not receive income or incur expenditures treated as deductions for federal income tax purposes prior to that date, the partnership should be treated as a TEFRA partnership.

In the instant case, we believe that a convincing argument can be made to support the Service's treatment of [REDACTED] as a TEFRA partnership. Although the Partnership was "formed" in the technical sense upon its filing of a Certificate of Limited Partnership prior to September 3, 1982, a number of other factors militate in favor of a finding that [REDACTED] was nothing more than a shell partnership on that date. First, the Certificate of Limited Partnership initially filed on [REDACTED], named a single limited partner who, as we understand, was later dropped from the roll of limited partners. From this it can be reasonably inferred that the original limited partner was merely a straw man designated for the purpose of fulfilling state law requirements in order to qualify the partnership prior to the effective date of TEFRA. By all appearances, this nominal partner had served his purpose and was no longer required once the true investors were admitted as limited partners. Judging by the deposit on [REDACTED], of a substantial sum into the partnership's bank account, coupled with the filing of an Amended and Restated Certificate of Limited Partnership the following day, [REDACTED] --as actually constituted--was not formed until a date in late [REDACTED].

Second, the general partners' corporation performed organization tasks and incurred expenditures on behalf of the partnership prior to September 3, 1982. We, too, believe this is an important consideration. In addition to the probability that these expenses could not be attributed to the Partnership, the fact that the general partners acted through their corporate entity in performing these functions and incurring these costs also suggests that [REDACTED] either was not yet recognized by its potential creditors as a separate partnership entity, or that its promoters did not hold it out to third persons as a partnership.

Additional facts similarly support the determination that [REDACTED] is actually a TEFRA partnership. These include the delayed opening of a partnership bank account (presumably until after the investors' subscription fees could be received); the contracts which provided for the acquisition of the partnership's major asset as of [REDACTED]; the date on the title insurance policy for the building; and the settlement provision that the Partnership's interest expense (a partnership item) was incurred beginning [REDACTED]. All of these events occurred after the effective date of TEFRA.

In summary, we believe that a facts and circumstances approach should be applied to the determination of a partnership's formation date for purposes of determining when its taxable year began. We are convinced that this approach, when applied to the facts of the instant case, will result in a determination that the partnership was actually formed after

September 3, 1982. Therefore, we agree that the TEFRA determination should be sustained and the partnership-level audit proceedings should continue. We also agree that the statutory notice of deficiency received by taxpayers was improperly issued. Pursuant to our prior oral technical advice, taxpayers should have been notified that the Service will not proceed with the assessment or collection of the deficiency determined in the statutory notice.

ROBERT P. RUWE

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